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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY
OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NORTH DAKOTA FARM BUREAU IN SUPPORT OF PETITIONER

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With the written consent of the parties, reflected in letters on file with the Clerk, the American Farm Bureau Federation, National Cattlemen's Beef Association and North Dakota Farm Bureau respectfully submit this brief as *amici curiae*.[1]

INTEREST OF *AMICI CURIAE*

The American Farm Bureau Federation ("AFBF") is a voluntary, general, farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois.[2] The AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. The AFBF has member organizations in 50 states and in Puerto Rico, representing more than 4.9 million member families. AFBF's policies, adopted by the voting delegates of the member state Farm Bureaus to AFBF's annual meeting, provide, in relevant part, as follows: "Isolated wetlands (vernal pools, etc.) not connected to navigable

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[1] No counsel for a party authored this brief in whole or in part and no person or entity other than *amici* and their members have made a monetary contribution to the preparation or submission of the brief.

[2] The Cook County Farm Bureau, DuPage County Farm Bureau and Kane County Farm Bureau, which are affiliated with the Illinois Farm Bureau, do not support AFBF's participation in this brief due to their opposition to the location of the proposed landfill on the Solid Waste Agency of Northern Cook County ("SWANCC") site.

waterways, should not be subject to regulation under the Clean Water Act."

Initiated in 1898, the National Cattlemen's Beef Association ("NCBA") is the marketing organization and trade association for America's one million cattle farmers and ranchers, all of whom have a stake in maintaining a strong livestock industry which is essential to the nation's economic stability, the viability of many rural communities and the sustainability of a healthful and high-quality food supply for the American public. With offices in Denver and Washington, D.C., NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry.

The North Dakota Farm Bureau ("NDFB") is one of the 51 organizational members of the AFBF. The NDFB is a voluntary, general farm organization incorporated in North Dakota in 1942. The NDFB is a non-profit organization which fosters the mission of the AFBF on the local level. With member organizations in 50 counties, the NDFB serves 26,500 members.

American farmers and ranchers own or lease hundreds of millions of acres of private and public agricultural and ranch lands, producing food, fiber and livestock for themselves, other Americans and world-wide consumers. While American farmers and ranchers have the highest production rates in the world, multiple layers of restrictive regulations at the local, state and national levels have impaired their ability to farm and ranch efficiently in an increasingly competitive global market. In some instances, the regulatory burden has become too

much to bear, bankrupting farmers and ranchers whose families have been in these industries for generations and forcing sale of their real and personal property.

The United States Army Corps of Engineers' ("Corps") expansive interpretation of its authority places millions of acres of agricultural lands within its regulatory stranglehold. The Corps' questionable assertion of jurisdiction over isolated, intrastate waters under the Clean Water Act ("CWA") and the Commerce Clause threatens to place another extraordinary and unreasonable burden on farmers and ranchers. Accordingly, *amici* submit this brief detailing the deleterious effects of the Corps' misguided attempt to regulate isolated, intrastate waters.

SUMMARY OF THE ARGUMENT

The issue before the Court is whether the Corps' assertion of jurisdiction over isolated, intrastate waters which are, or would be, used by migratory birds impermissibly expands its authority under the CWA or the Commerce Clause.

The CWA authorizes the Corps to exercise limited jurisdiction over navigable and connected waters. However, under the migratory bird rule rationale the Corps applied in the immediate case, the Corps' asserted jurisdiction is limitless. The Corps' assertion of jurisdiction under the migratory bird rule places an undue burden on the private property of farmers and ranchers without Congressional authority. There are millions of isolated, intrastate pools, ponds and depressions filled with water on an intermittent basis located on farm and ranch lands which could appeal to

migratory birds as habitat or resting places. As a result, the Corps could assert its jurisdiction over millions of acres of isolated, intrastate waters on lands owned, leased and operated by farmers and ranchers, but nowhere near any navigable waters. The migratory bird rule threatens normal farming and ranching activities by reducing farmers' and ranchers' ability to produce food, fiber and livestock efficiently, without undue regulatory interference.

The Commerce Clause does not support the Corps' assertion of jurisdiction over isolated, intrastate waters on the basis that they are or have the potential to be migratory bird habitat. The discharge of dredged or fill material into isolated, intrastate waters has absolutely no effect on or connection with interstate commerce. The Corps' reliance on the interstate flight habits, habitat and human exploitation of migratory birds does not provide the necessary nexus for federal regulation of isolated, intrastate waters.

If the Corps' attenuated Commerce Clause argument is accepted, land use planning, an area of regulation traditionally within state and local jurisdiction, will be usurped. Federal land use regulation of isolated, intrastate waters, without consideration of local exigencies, can only impair farmers' and ranchers' productivity.

The Corps' extension of its jurisdiction to isolated, intrastate waters under its migratory bird rule is an unreasonable and over-zealous interpretation of its authority under the CWA and the Constitution's Commerce Clause. Such an interpretation significantly threatens farmers' and

ranchers' productivity. Congress did not intend the Corps' authority under the CWA to extend to any and all waters of the United States deemed suitable, or potentially suitable, as habitat by migratory birds, particularly if such waters were located on productive farm and ranch lands.

ARGUMENT

I. THE CWA DOES NOT AUTHORIZE THE CORPS' JURISDICTION OVER MIGRATORY BIRDS' HABITAT IN ISOLATED, INTRASTATE WATERS.

The migratory bird rule merely represents the latest chapter in the Corps' usurpation of Congressional authority to amend the CWA. The Corps has expanded its CWA authority to cover *all* waters rather than only those which are navigable or connected or adjacent to such waters. As discussed below, the Corps' assertion of such overly broad jurisdiction contravenes the intent of Congress as expressed in the CWA and subjects farmers and ranchers to unprecedented and unwarranted federal regulatory intrusion.

The CWA grants the Corps broad but not unlimited regulatory jurisdiction. Section 404 of the CWA requires a permit for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Navigable waters are defined as "waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). While the plain language of the CWA grants the Corps jurisdiction over waters that are navigable, this Court has determined that CWA jurisdictional waters include navigable waters and those connected or adjacent to such waters. *United*

States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

The Corps has defined "waters of the United States" generously to include:

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .

33 C.F.R. § 328.3(a)(3) (1999).

In the preamble to the Corps' regulations published in 1986, the Corps expanded the definition of "other waters" to include waters

> a. [w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. [w]hich are or would be used as habitat by other migratory birds which cross state lines. . . .

51 Fed. Reg. 41,206, 41,217 (1986).

The Corps thus asserted jurisdiction over isolated, intrastate waters by virtue of administrative fiat. Indeed, the Corps did not even promulgate the migratory bird rule in accordance

with the Administrative Procedure Act. 5 U.S.C. § 553.[3]

In the event the Corps' interpretation of its jurisdiction over isolated, intrastate waters under the migratory bird rule is accepted, the ability of farmers and ranchers to produce crops and livestock

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[3] As a result, the Fourth Circuit Court of Appeals struck down the migratory bird rule in 1989. *Tabb Lakes v. United States*, 715 F. Supp. 726, *aff'd*, 885 F.2d 866 (4th Cir. 1989). The Fourth Circuit affirmed the district court's conclusion that the contents of the migratory bird rule required prior notice and opportunity to comment.

The Court of Appeals for the District of Columbia recently rejected a similar attempt at regulatory "ukase" in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The court rejected attempts by the Environmental Protection Agency to enforce agency guidelines without going through statutory notice and comment requirements. The court held, "It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Id.* at 1024. In the case at bar, the Corps seeks to escape statutory requirements by promulgating a regulation as a preamble. The CWA does not give the Corps a "roving commission" to regulate all isolated, intrastate waters, and then to inquire into evils and upon discovery, correct them. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935)(Cardozo, J., concurring); *Appalachian Power Co.*, 208 F.3d at 1026.

in the United States will be impaired. The productivity of farm and ranch land in the United States has increased significantly during the past two decades. With the increase in productivity, the demand for new farm and ranch land has decreased, thereby decreasing the demand by farmers and ranchers to convert wetlands. The primary concern of farmers and ranchers today is preserving the productivity of their agricultural and ranch lands so that they can earn a livelihood and survive financially in a competitive global market.

American farmers and ranchers currently have over 300 million acres in active production.[4] Economic Research Serv., U.S. Dep't of Agric., *Land Use, Value, and Management Q&A's*, (visited July 24, 2000), <http://www.ers.usda.gov/briefing/landuse/ruseqa6.htm>. Jurisdictional wetlands exist on approximately 99 million acres of those in active production. AFBF Mot. For Leave to File Br. Amicus Curiae and Br. Amicus Curiae in Supp. of the Pet. at 7. Approximately nine million isolated, intrastate waters are located in the United States, a significant number of which are located on farm and ranch lands in active production.[5] Jonathan B. Adler,

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[4] This does not include millions of acres of federal land under permit or lease to ranchers, upon which they have developed innumerable stock ponds and watering sites.

[5] Due to abnormally heavy rains during the past decade in the upper midwest region of the United States, numerous additional temporary isolated, intrastate waters have been created, and existing isolated, intrastate pools of water have

Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation, 29 Northwestern Sch. L. Lewis & Clark Coll. Envtl. L. 1, 40 (1999). The isolated, intrastate waters located on agricultural lands may be created artificially or naturally, vary in size and depth and exist on a short-term or long-term basis. Some of them serve or could serve as resting, mating and living areas for migratory birds. However, like the water-filled trenches and depressions at the SWANCC site, they have absolutely no connection with navigable, interstate waters.

Section 404(f) of the CWA provides farmers and ranchers an exemption from the Section 404 permit requirements relating to the following discharges of dredged or fill material into those areas associated with navigable waters:

> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable

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(cont'd.)..
expanded beyond their normal boundaries, reducing the number of acres in production.

structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches; . . .

(E) for the purpose of construction or maintenance of farm roads or forest roads, . . . to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized . . . .

33 U.S.C. § 1344(f); 33 C.F.R. § 323.4 (1999).[6]

If the Corps' assertion of jurisdiction under the migratory bird rule is accepted by this Court, this exemption is illusory for farmers and ranchers. Even though the Section 404(f) statutory exemption existed in 1986, as did the related regulations,[7] the

[6] The application of this exemption is limited to on-going, established farming, silviculture and ranching activities. 33 C.F.R. § 323.4(a)(1)(ii) (1999).

[7] 51 Fed. Reg. 41,206, 41,233 (1986).

Corps, in the same preamble setting forth the migratory bird rule, reserved its right "on a case-by-case basis" to include in the definition of "waters of the United States":

> (a) Non-tidal drainage and irrigation ditches excavated on dry land.
>
> (b) Artificially irrigated areas which would revert to upland if the irrigation ceases.
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

51 Fed. Reg. 41,206, 41,217 (1986).

If the Corps' assertion of jurisdiction over the isolated, intrastate waters on the SWANCC site is upheld, then the Corps' reservation of rights over such waters located on agricultural lands may be exercised under the migratory bird rule.

The Corps' self-delegation of authority to apply the migratory bird rule to drainage and irrigation ditches, artificially irrigated areas and stock ponds is an outright violation of the 1977 amendments to the CWA. Congress expressed itself plainly in Section 404(f) when it exempted normal farming and ranching activities, as well as construction or maintenance of farm or stock ponds

or irrigation ditches or the maintenance of drainage ditches, from the permitting requirements of Section 404. The legislative history behind Section 404(f) is replete with support for Congress's plainly expressed intent.

Section 404(f) was added to the CWA by Public Law 95-217. The House of Representatives' debate on the conference report accompanying the House bill, H.R. 3199, pointed out that "[n]ew subsection (f) of section 404 provides that Federal permits will not be required for narrowly defined activities specifically identified in paragraphs A-F that cause little or no adverse effects either individually or cumulatively." 123 Cong. Rec. 38,997 (1977)(statement of Rep. Harsha).

The Corps decided to undertake a "case-by-case" determination as to whether farm and ranch waters are waters of the United States. The legislative history refutes the Corps' interpretation: "A case-by-case permit review would not be required for narrowly defined activities that cause little or no adverse effects either individually or cumulatively, *including those activities narrowly defined in 404(f)(1)(A-F).*" *Id.* (emphasis added).

Similarly, the Senate debate on the conference report states that:

> The conferees agreed to adopt the Senate amendment on particular exclusions from permit requirements. This legislatively clarifies the exclusion of certain activities that do not involve point source discharge and that will be adequately controlled by management practices. The amendment clarifies that normal farming, ranching, and silvicultural activities such as plowing, seeding, cultivating, and harvesting as well as minor drainage and soil and water conservation practices performed on uplands, were not intended to require 404 permits. The amendment also excludes from permit requirements, discharges of dredged or fill material in conjunction with the [construction or maintenance of farm and stock ponds or irrigation ditches].

Id. at 39,210-39,211 (statement of Sen. Wallop).

The Senate amendment was adopted prior to Senate passage of the underlying legislation, S. 1952. The report of the Senate Committee on Environment and Public Works discussed the rationale for the amendment. The Committee was persuaded by testimony that no Section 404 permit should be required for "gray area" practices involving agriculture, mining and construction activities. The Committee specifically exempted construction or maintenance of farm or stock ponds, as well as the construction and maintenance of agricultural irrigation ditches and the maintenance of drainage ditches, from the permit requirements. S. Rep. No. 95-370, 95th Cong., 1st Sess. 76 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4401. This was the source of the amendment which was eventually adopted by the conferees,

passed by the House and Senate, and enacted into law as Section 404(f) of the CWA.

In defending the amendment, Senator Muskie (floor manager for the bill) responded to a substitute amendment offered by Senator Bentsen by noting that "these normal activities which have aroused normal Americans against the threat of over-regulation by the Corps of Engineers have been exempted from that threat . . . ." 123 Cong. Rec. at 26,721. Senator Tower of Texas expressed similar concerns:

> If we do not act affirmatively and clean up the language in [the Clean Water Act], it will result in unwarranted and despotic intrusion by the Federal Government over every brook, creek, cattle tank, mud puddle, slough or damp spot in every landowner's backyard across this Nation.

Id. at 26,722.

The Corps' interpretation of its authority under the CWA, as stated in its preamble to its 1986 regulations, raises the very real specter of Senator Tower's prediction coming true, even after Congress took his advice and amended the CWA so as to prohibit expressly such an interpretation.

While the legislative history, statute and regulations evidence an intent to exempt certain farming and ranching activities from the Section 404 program, the application of such an exemption to current farming and ranching activities has become more challenging. Farmers and ranchers

today use advanced technologies and heavier and more cumbersome equipment in order to maintain a high level of productivity for their agricultural lands. Such technologies and equipment change rapidly. Farmers' and ranchers' use of new technologies and equipment threatens to increase conflicts with the Corps' interpretation of what constitutes "normal" farming and ranching activities under Section 404(f), thus increasing the potential for the Corps' assertion of jurisdiction over isolated, intrastate waters located on agricultural and ranch lands. In addition, the Corps' assertion of jurisdiction under the migratory bird rule threatens to overpower any rational analysis of whether certain activities constitute "normal" farming and ranching activities.

For example, in certain parts of California, deep plowing (five feet deep) is normal plowing practice, while such a practice is not necessary in the fertile midwest. Nevertheless, the Corps' assertion of jurisdiction under the migratory bird rule threatens to regulate isolated, intrastate waters, namely cropland depressions filled with water intermittently and temporarily, affected by such deep plowing practices. Similarly, current methods used for the manipulation of water levels for the production of rice have come under increasing scrutiny by the Corps, as rice fields make select habitat for migratory birds.

Farmers and ranchers will not be able to maintain current levels of productivity if their activities are deemed outside the scope of the Section 404(f) exemption and if the Corps is authorized to exercise jurisdiction over isolated, intrastate waters based solely on the catch-all

migratory bird rule. The Corps' expansive interpretation of its jurisdiction, if upheld, would adversely affect farmers and ranchers by decreasing their productive acreage, which would grossly increase the costs of producing food, fiber and livestock. And if the Corps' interpretation is upheld, farmers and ranchers would be forced to divert their energies to negotiating a regulatory morass which is time-consuming, expensive and often futile, hampering them from using their land in the most productive manner possible.

The Corps' interpretation of its jurisdiction at the SWANCC site far exceeds the authority Congress granted to the Corps under the CWA. Farmers and ranchers in the United States need a functional definition of "waters of the United States," not one which prevents the productive use of their farms and ranches by virtue of the presence or potential presence of migratory birds on isolated, intrastate waters within farm and ranch boundaries.

II. THE COMMERCE CLAUSE DOES NOT AUTHORIZE THE CORPS' JURISDICTION OVER ISOLATED, INTRASTATE WATERS WHICH MIGRATORY BIRDS MAY OR DO SELECT AS HABITAT.

There is no constitutional basis for the Corps' assertion of jurisdiction over isolated, intrastate waters under the Commerce Clause. Congress's Commerce Clause power is limited. Under the Commerce Clause, Congress may exert power to regulate activities that substantially affect commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

The dredging and filling of isolated, intrastate waters, particularly those located on remote agricultural lands, does not fall within the definition of activities affecting commerce. The addition of flocks of migratory birds to the remote landscape does not change this conclusion. As Justice Thomas stated, "The basis asserted to create federal jurisdiction over petitioner's land" is "even more farfetched than that offered, and rejected, in *Lopez*." *Cargill, Inc. v. United States*, 516 U.S. 955, 957-58 (1995) (Thomas, J., dissenting from denial of certiorari). Here, the Seventh Circuit relied on statistics relating to monetary earnings generated as a result of hunting, trapping and other commercial exploitation of migratory birds to connect migratory birds' selection of habitat with interstate commerce. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). By citing human exploitation of migratory birds as support for the Corps' assertion of jurisdiction over isolated, intrastate waters for wildlife "protection," the court not only contradicted itself, but showed just how farfetched the migratory bird rule is.

If this tenuous connection to interstate commerce is found to be sufficient under the Commerce Clause, there is no doubt that farmers and ranchers will be affected detrimentally, as they are forced to proceed through the Section 404 permit process or ultimately are denied dredge and fill permits at the end of the process. Migratory birds inhabit millions of acres of agricultural lands annually, resting on or making habitat in temporary, isolated water pockets in agricultural fields. The Seventh Circuit's conclusion that a habitat suitability criterion would limit the number of

isolated, intrastate waters affected by the Corps' assertion of jurisdiction is misguided. As any farmer, rancher or layperson knows, migratory birds are not discerning shoppers for habitat and will make homes of even the most shallow field puddle, stock pond or water-filled cattle track. The unpredictable behavior of migratory birds with respect to waters with no connection to navigable waters or commerce cannot withstand constitutional scrutiny as a legitimate basis on which to extend the Corps' jurisdiction over millions of acres of waters located on farms and ranches. Such an extension would amount to unauthorized federal regulation of land use, an area traditionally regulated by state and local governments.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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